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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957.

No. 315

JOHN KASPER, *Petitioner*,

v.

D. J. BRITTAIN, JR., J. M. BURKHART, W. B. LEWALLEN, SIDNEY DAVIS, and WALTER E. FISCHER, *Appellees*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit which affirmed judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, finding petitioner guilty of criminal contempt of court and sentencing him to one year in the penitentiary.

OPINION BELOW

The opinion of the Court below has not yet been officially reported. Copy of the opinion and judgment are annexed hereto and printed in the Appendix.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 1, 1957 (App. No. 2a); a Petition for Re-hearing was timely filed and said Petition for Re-hearing was denied on June 27, 1957 (App. No. 9a). The jurisdiction of this court is invoked pursuant to the provisions of 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. The restraining order or final injunction violates the First Amendment to the Constitution.

2. The statements made by the appellant as shown in the contempt citation were all protected by Amendment I of the United States Constitution.

3. The temporary restraining order was void and petitioner could not be held guilty of criminal contempt for disobeying it.

4. The procedure followed by the trial court constituted a denial of due process of law to the appellant under Amendment V of the United States Constitution.

5. The contempt citation against appellant can not stand because it was not brought in the name of the United States and not by the real parties in interest.

6. The Circuit Court erred in permitting United States Attorneys to represent respondents as of right which prejudiced petitioner's rights.

7. The procedure followed against the petitioner constituted an improper use of the federal police power since the state police power resolved the situation.

8. The sentence of the petitioner was null and void because the District Court did not have jurisdiction over the appellant nor the subject matter.

9. The temporary restraining order and the permanent injunction violate the 14th Amendment to the United States Constitution.

10. The sentence in the instant case was grossly excessive and constituted cruel and unjust punishment.

STATEMENT OF CASE

On January 4, 1956, the United States District Court for the Eastern District of Tennessee, Northern Division, issued an injunctional order requiring the appellees in an Equity case to desegregate the high school at Clinton, Anderson County, Tennessee, by the fall term of 1956. The petitioner was not a party to that case in any way and was not an agent, servant, employee, or attorney of any of the parties to that case.

The petitioner was served with a temporary restraining order in said case on August 29, 1956, which was his first introduction to that case, while he was making a speech in front of the Clinton, Tennessee, Court House. The temporary restraining order enjoined the petitioner from hindering, obstructing, or interfering with the carrying out of a memorandum injunctional order issued by said District Court on January 4, 1956, and specifically under the temporary restraining order he was enjoined "from further hindering, obstructing, or in any wise interfering with the carrying out of the aforesaid order of this court, (January 4, 1956 order) or from picketing Clinton High School either by words or acts or otherwise." A

copy of the January 4, 1956, injunctional order was never served upon petitioner in any way and as aforesaid, he was not a party to the equity cause at the time the said injunctional order was entered.

The petitioner was found guilty of criminal contempt of Court for violating the temporary restraining order. At the time the temporary restraining order was served upon him he was required by the terms of the order to appear in the District Court at Knoxville the next day (August 30, 1956) at 1:00 o'clock p.m. to show cause why a preliminary injunction should not be issued. As he was entering the Court Room the next day (August 30, 1956) he was served with the attachment for criminal contempt.

The Court was requested to grant appellant a 24-hour continuance on the temporary restraining order hearing, which request was denied. As a result of the hearing, the Court granted the preliminary injunction and found the appellant guilty of criminal contempt of Court, and the appellant was sentenced to the penitentiary for one year. A request for bail was taken under advisement and the petitioner was kept in the custody of the United States Marshal in Knox County Jail, Knoxville, Tennessee, until bail was granted on September 6, 1956.

Subsequently, on Septemer 6, 1956, a further hearing was had respecting the preliminary injunction and the preliminary injunction was ordered to be a permanent injunction and at that time (September 6, 1956), petitioner was granted bail pending appeal in the amount of $10,000.00.

REASONS FOR GRANTING THE WRIT

1. The restraining order and final injunction violated the First Amendment to the Constitution. The temporary restraining order; the preliminary injunction, and the permanent injunction are all in the wording of the temporary restraining order and the injunction provision is as follows:

> "It is ordered and decreed by the Court that the aforementioned persons, their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them, be and they hereby are enjoined and prohibited from further hindering, obstructing or in any wise interfering with the carrying out of the aforesaid order of this Court (order of January 4, 1956) or from picketing Clinton High School, either by words or acts or otherwise."

In the trial court and in the Circuit Court, appellant took the position that this injunction was so broadly worded as to cut across the First Amendment of the Constitution which rendered the temporary restraining order and the permanent injunction null and void. The issue, "Does the restraining order or final injunction violate the First Amendment to the Constitution" was a point on appeal before the Circuit Court and as the Court will observe from a reading of the opinion of the Circuit Court, that Court did not decide this issue at all.

2. It was petitioner's position that the statements he made in his speech after the temporary restraining order was served upon him and as incorporated in the Order for Attachment were protected under the freedom of speech provisions of the First Amendment. This Court will notice that the trial court and

the Circuit Court went on to consider all of the activity in Clinton, Tennessee, adverse to integration as being chargeable against the petitioner and then said the sum total is not protected under freedom of speech. This was very prejudicial to the petitioner as the Court should have considered only the statements contained in the Order for Attachment because that constituted the indictment, so to speak. *Bridges* v. *California*, 314 U.S. 252, *Craig* v. *Harney*, 331 U.S. 367; *Terminiello* v. *Chicago*, 337 U.S. 1; *Thomas* v. *Collins*, 328 U.S. 331.

3. Petitioner challenged the validity of the temporary restraining order before the trial court as shown in the opinion of the trial court (Certified Record 25a). It was made a point on appeal to the Circuit Court (Question No. 5) and yet that court did not decide this issue. If the temporary restraining order is invalid because of any of the points urged challenging its validity, then petitioner cannot be guilty of violating it if the District Court did not have jurisdiction of petitioner and the subject matter. The Circuit Court held that the District Court had jurisdiction of the subject matter but did not decide the issue as to whether or not the District Court obtained jurisdiction of the petitioner. This went to the very heart of the case and was not decided by the Circuit Court. It naturally follows that if the temporary restraining order was void, then the permanent injunction is also void and petitioner's constitutional rights are being violated every day the permanent injunction is permitted to stand. See *In re Sawyer*, 124 U.S. 200; 12 A.L.R. 2d 1083-1084. Also *Giles* v. *Harris*, 189 U.S. 475, and *Williams* v. *Dalton*, 231 F. 2d 646.

There were no pecuniary or property rights alleged at issue in the litigation leading to the injunction involved here; and yet the principle is fundamental in federal courts that chancery has power only over proprietary interests. *Re Sawyer, supra; In Re Debs,* 158 U.S. 564, 593; *International News Service* v. *Associated Press,* 248 U.S. 215, 236; *Cavén* v. *Clark,* 78 F. Supp. 295.

Finally, the District Court was without jurisdiction in issuing its secondary injunction, not only because the primary injunction was invalid as a mandamus and beyond the court's power to issue as a mandatory injunction, but also because the secondary injunction, as interpreted by the Court itself, operates as an injunction against ordinary crimes and misdemeanors—whereas the point is elementary that courts of chancery cannot enjoin crimes. *Re Sawyer, supra.* The rule is subject to the single exception that the crime of "public nuisance" may be enjoined in the extent necessary to prevent continuing injuries against property. *In Re Debs, supra.* It is true that "criminal equity" was the ancient jurisdiction of the Star Chamber, but Star Chamber jurisdiction was abolished by statute in 1614. (16 Charles I, c. 10.)

4. The parent case wherein petitioner was cited for contempt was a suit begun some five years ago by certain plaintiffs against the school board of Anderson County, Tennessee, to require the enrollment of certain colored students in that formerly all-white school. That suit culminated with an order entered in said case on January 4, 1956, wherein the District Court

ordered the colored children to be admitted in the school at the beginning of the 1956 fall school term. Those minor plaintiffs were admitted to that school and all during the proceedings against petitioner they were enrolled in and attending the school and the school continuously functioned upon an integrated basis. This closed this equity case and opened it to freedom of speech. Petitioner was first introduced to the parent case when the temporary restraining order was served upon him. At the time the temporary restraining order was served upon him, the January 4, 1956, order which he is charged with violating was not served upon him and he was in no way chargeable with notice of that order. It is inherently wrong to charge petitioner with violating an order when he had no knowledge whatsoever concerning said order. Petitioner says that he has been denied due process of law by being punished for the violation of an order of which he had no notice.

Petitioner took the position that the District Court did not have jurisdiction of his person nor of the subject matter. The Circuit Court held that the District Court did have jurisdiction of the subject matter, but the court did not deal with the position taken by the petitioner that the District Court did not have jurisdiction of his person. The record shows that the petitioners for the temporary restraining order (Certified Record 2a) acted as individual citizens and not in any official capacity; therefore, they were not the proper persons to petition the court for a temporary restraining order under Rules 17, 65(b) and 65(d) of the Federal Rules of Civil Procedure, and Rule 42(b) of the Federal Rules of Criminal Procedure. The record shows that some of the same individuals who petitioned

for the temporary restraining order petitioned for the citation for criminal contempt of the petitioner (Certified Record 118). These petitioners did not have the legal capacity to petition for criminal contempt of the petitioner because that could only be done by the United States Attorney or the District Court judge, but as pointed out later in this case, the entire procedure against the petitioner was fatally defective because the United States was not a party in this procedure. The petitioner pointed out in detail to the trial court and to the Circuit Court that the aforementioned Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure were not followed; hence, the District Court did not obtain jurisdiction over the petitioner. The court will observe that the Circuit Court did not deal with these issues at all. In the Circuit Court, the petitioner cited the case of *Alemite Manufacturing Corporation* v. *Staff*, 42 F. 2d 832, wherein Judge Learned Hand clearly stated that an injunction issued by a court against a person over whom the court did not have jurisdiction was pro tanto brutum fulmen, and that aptly describes the temporary restraining order, the preliminary injunction, and the permanent injunction in the instant case. This court, in the case of *United States* v. *United Mine Workers of America*, 330 U.S. 293, outlines the procedure to be followed in citing a person for criminal contempt and cited with approval the case of *Howat* v. *Kansas*, 258 U.S. 181. In the United Mine Workers case, supra, the Court at Page 189 quoted from the Howat case as follows:

> "An injunction duly issuing out of a Court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however er-

roneous the action of the Court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case."

The Court will observe from the opinion rendered by the trial court that counsel for petitioner was bewildered by the type of procedure followed in that the procedure followed resembled a procedure for a citation for civil contempt because the United States was not a party. (Certified Record 25a)

The Circuit Court completely misconceived petitioner's position regarding a jury trial. The petitioner did not demand a trial by jury in the District Court because there was no statute under which he was entitled to a jury trial. It was the position of the petitioner that in this constructive criminal contempt case there was no occasion to deprive him of any of the protections of the Bill of Rights. In his oral argument before the Circuit Court, counsel for petitioner made the following statement:

"It is appellant's position that in a constructive criminal contempt case of this type there is no occasion for depriving the accused of any of the protections of the Bill of Rights. The case of *Nye* v. *United States*, 313 U.S. 33, supports this proposition."

In petitioner's brief before that Court, he also relied on the case of *Bridges* v. *California*; 314 U.S. 252.

In this Court's decision on June 10, 1957, involving the case of the wives who murdered their soldier husbands, Justice Black said:

"Trial by jury in a court of law and in accordance with traditional modes of procedure after an

indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness."

These cases very well point up petitioner's position in this case. Petitioner believes that he was also denied due process of law because the trial court denied him a 24-hour continuance. The statement which counsel for petitioner made before the Circuit Court clearly summarizes the situation as follows:

> "The procedure followed by the Trial Court constituted a denial of procedural due process of law to the appellant under the Fifth Amendment. The appellant was served with the temporary restraining order at 7:45 p.m. on Wednesday, August 29, 1956, and was ordered to appear in the Federal District Court the next day at 1:00 o'clock. I represented the respondent and he telephoned me late that evening to advise me that he had been served with the restraining order and I arrived in Knoxville by plane the next day around noon. I was met at the airport by the appellant and I read the petition for the temporary restraining order and the restraining order in a taxicab going from the airport to the Court House. As we entered the Court room the appellant was served with the Criminal contempt citation. I feel strongly the Court abused its discretion in denying us a 24-hour continuance on the hearing on the temporary restraining order under the circumstances, because in a subsequent trial in the State Court where this appellant was charged with sedition and inciting to riot, 65 witnesses were called in his behalf and the jury deliberated less than one hour and acquitted him. This record shows that the appellant called no witnesses in his behalf due to the summary procedure adopted, so the Court's denial of the short continuance requested operated greatly to the

> prejudice of appellant and constituted a grave abuse of discretion."

This entire proceeding is in a fuzzy zone of the law and an attorney cannot possibly know and protect all of the possible rights of his client under this kind of pressure. It is therefore respectfully submitted that the Court should be most indulgent and review the record carefully to ascertain if the appellant's constitutional rights have been invaded because he has been sentenced to the penitentiary. In the Court's opinion (App. 7a) appears the following:

> "The contention that the procedure followed by the trial Court constituted a denial of procedural due process because the restraining order was not served upon appellant, wherefore, he could not be guilty of violating it, is simply not applicable to the facts of the record."

The appellant did not take that position and the Court is in error in making that statement. Appellant stated throughout his briefs and in oral argument that the temporary restraining order was served upon appellant around 7:45 p. m. on Wednesday, August 29, 1956, while he was making a speech in front of the Clinton Court House. The issue in that respect was that the temporary restraining order was not read to appellant; there were other witnesses who said that the temporary restraining order was read to the appeliant, so that the trial court and this Court would be justified in saying that the temporary restraining order was read to the appellant.

The Court evidently confused the position taken by the appellant on this point with the position taken by the appellant regarding the order entered in the cause

on January 4, 1956; that is the order which appellant says was not served upon him at anytime, nor in any manner was he advised of its substance. As pointed out earlier, the appellant was not a party to the equity case either directly or indirectly at that time. The statement mentioned above (in the Court's opinion) is unfair to the appellant and his counsel because it indicates to persons reading the opinion not familiar with the case that appellant took a position that was completely contradicted in the record.

5. As pointed out earlier herein, the contempt citation against petitioner was not brought in the name of the United States and it was not brought in the name of the county school board as was the situation in the case of *Brewer* v. *Hoxie School District*, 238 F. 2d 91 (C.A. 8). Since the petition for the criminal contempt citation was brought by private individuals (Certified Record 11a) and was not prosecuted by the United States so that the petitioner would have known that criminal sanctions were sought to be invoked against him, the petitioner has been denied due process of law. Criminal contempt of a federal court is an offense against the United States. *New Orleans* v. *Steamship Co.*, 20 Wall 387, 392, 22 L. Ed. 354. *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324; 48 L. Ed. 997.

6. When United States Attorneys entered their appearance as a matter of right in the Circuit Court, your petitioner filed a Motion to Strike their appearance because the United States was not a party to the case. The Circuit Court overruled petitioner's Motion to Strike without prejudice to petitioner's position in that court that the United States was not a party to the case. Your petitioner says that this was prejudicial to his rights in view of the issue that was be-

fore that court. If the government attorneys wanted to enter their appearances in the nature of amicus curiae, they should have been held to required procedures.

7. The permanent injunction issued in this case (Certified Record 31a) and the manner in which it is used is an exercise of the federal police power; however, the record in this case shows that after the state police power was called into Clinton there was no difficulty whatsoever in maintaining law and order. In the opinion of the Circuit Court the statement is made that "The Federal courts are empowered to protect constitutional federal rights even though state power may equally be so exercised" (App. 8a) is contrary to Article IV, Section 4 of the Constitution which provides that federal police power can be used in a state only upon application of the state legislature when in session, or by the Governor when the legislature is not in session. It would appear abundantly clear that if this pronouncement is permitted to stand that provision of the Constitution is rendered ineffective or meaningless.

8. The Circuit Court held that the sentence against petitioner should stand without deciding the question as to whether or not the District Court obtained jurisdiction of the appellant. The Circuit Court ignored this point of petitioner's appeal and it will be noted from the opinion rendered by the trial judge (Certified Record 25a) that the petitioner consistently challenged the jurisdiction of the trial court. The Circuit Court cites the case of *Howat* v. *Kansas*, 258 U.S. 181; *United States* v. *United Mine Workers of America*, supra; *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 211 F. 2d 449 (C.A. 6), in support

of its decision that petitioner can be punished for violation of an injunctional order even if the order "may seemingly be challenged as invalid." Those cases so hold, but in each of those cases the Court had jurisdiction of the person and the subject matter. In order for those cases to cite the position taken by the Circuit Court, the Circuit Court should have dealt with petitioner's position that the District Court did not obtain jurisdiction over the petitioner. The petitioner cited to the Circuit Court the cases of *In re Sawyer*, 124 U.S. 200, where this Court said at page 221:

> "The Circuit Court (of the United States) being without jurisdiction to entertain the bill in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were guilty of contempt in disregarding that order is equally void, their detention, by the marshal under that adjudication is without authority of law, and they are entitled to be discharged. *Ex parte Rowland*, 104 U.S. 604; *Ex parte Fisk*, 113 U.S. 713 and *In re Ayers*, 123 U.S. 443, 507."

See also *Ex parte Terry*, 128 U.S. 289 and *Ex parte Harding*, 120 U.S. 782, all cited on page 16 of appellant's Reply Brief. See also 12 ALR 2d 1079-1080. The *Howat* case supports appellant's position.

An absolute want of jurisdiction over the subject matter or person may be urged at any stage of proceedings; even collaterally and after judgment. 21 C. J. S. 167 ff., and cases there cited.

Jurisdiction is not a matter of sympathy or favor; the courts are bound to take notice of the limitations

on their authority. *Reed* v. *United States*, 211 U.S. 529.

9. This Court in deciding the case of *Brown et al* v. *Board of Education*, 347 U.S. 483, bottomed it on the 14th Amendment; to deprive the negro children the right to enter a particular school deprives them of "equal protection of the law." The 14th Amendment contains some clear and plain words in its fifth section as follows:

> "The Congress shall have power to enforce by appropriate legislation the provisions of this Article."

Nothing is said about the judiciary enforcing the amendment and no authority is given to the executive branch to enforce the amendment. The sole power to enforce the 14th Amendment is vested in the representatives of the people (Congress) which is required to act "'by appropriate legislation." Congress has passed no legislation to enforce the Fourteenth Amendment in respect to schools. The Courts should not be placed in the position of legislating. The Courts have consistently held the 14th Amendment applies only to the states and does not apply to any private individuals. The 10th Amendment further fortifies this position.

10. The petitioner would like this Court to review this sentence in the light of the facts and circumstances in the case because it is felt that the sentence is grossly excessive.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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